ORIGINAL

(S E R V E D)
(November 9, 2004)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

November 9, 2004

DOCKET NO. 02-08

ODYSSEA STEVEDORING OF PUERTO RICO, INC.

v.

PUERTO RICO PORTS AUTHORITY

RULING ON MOTION FOR SUMMARY JUDGMENT

The Respondent, the Puerto Rico Ports Authority ("PRPA"), has filed a motion asking for summary judgment and dismissal of Odyssea Stevedoring of Puerto Rico, Inc.'s ("Odyssea") complaint because PRPA claims it has not violated sections 10(d)(1), 10(d)(3) and 10(d)(4) of the Shipping Act of 1984 ("The Act").[1]

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[1]Section 10(d)(1) of the Act provides:

> No common carrier, ocean transportation intermediary or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property.

(continued...)

THE COMPLAINT

On May 31, 2002, the Complainant, Odyssea, filed a Complaint with the Commission against PRPA for: (1) failure to establish and observe reasonable regulations and practices in regard to the leasing of facilities; (2) refusal to deal; (3) discrimination; (4) deceit; and (5) the entry of a cease and desist order, and for reasonable damages incurred by Odyssea.

Odyssea's discrimination claim includes: (1) discrimination as to the facilities provided; (2) refusal to provide adequate facilities: and (3) being charged more for lesser facilities than that of its competitor, Island Stevedoring, Inc.

The Complaint reflected that while PRPA was entering into leases with other parties for terminal facilities at the Port of Puerto Rico at the Port of San Juan, Puerto, Rico ("the Port"), it was declining offers from Odyssea to enter into such leases. Odyssea alleged PRPA was untruthful when it stated there was a new policy against granting preferential areas and usages. Odyssea found PRPA's excuses unrealistic and unreasonable.

During discovery, Odyssea learned that PRPA did not have procedures, rules, regulations, criteria or any other defined objective standards for leasing terminal facilities and granting requests for preferential berthing. Odyssea maintained PRPA operates on an "ad hoc, case-by case basis, as well as uses vague and subjective standards," when responding to requests for space and leases.

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[1](...continued)

Section 10(d)(2) of the Act provides:

> No marine terminal operator may agree with another marine terminal operator or with a common carrier to boycott or unreasonably discriminate in the provision of terminal services to, any common carrier or ocean tramp.

Section 10(d)(4) of the Act provides:

> No marine terminal operator may give any undue or unreasonable preference or advantage with respect to any person.

Odyssea argued stevedores and terminal operators who already leased facilities from PRPA were not subjected to the same standards as Odyssea. Odyssea alleged PRPA sought to protect the business of such companies when renewing their leases.

Odyssea submitted PRPA discriminated against Odyssea in the provision of actual physical facilities, in the "value" of the facilities, as compared to its competitors. Odyssea alleged it has been placed at a disadvantageous competitive position because of the unreasonable actions by PRPA. Further, Odyssea maintained that PRPA has not established "legitimate transportation related factors" for its actions.

BACKGROUND

Odyssea leased its primary warehouse space at Pier 9 at Puerta de Tierra in the San Antonio Channel in the Port. Odyssea was afforded exclusive use of this facility. In 1997, Odyssea was informed PRPA was considering the purchase of the former United States Naval Base and Shipyard ("the Old Navy Base"). The public discussions did not reveal PRPA was going to summarily destroy all terminal facilities at Puerta de Tierra and shift all users to facilities at the Old Navy Base.

The Old Navy base was purchased by PRPA in June, 1999. Throughout the public discussions regarding this matter, it was always understood PRPA had to repair the facilities at the Old Navy Base before they would be generally usable as marine terminal facilities. Odyssea engaged in a number of meetings and discussions with PRPA and wrote letters to PRPA regarding the need for repairs at the Old Navy Base.

In April 2000, Odyssea was evicted from its primary warehouse space at Puerto de Tierra and relocated to the back of a World War I office building at Pier 15 at the Old Navy Base. Odyssea alleged PRPA failed to honor its representations that it would repair facilities at the Old Navy Base.

Odyssea's new space is approximately 19,000 square feet and cargo may be stored up to a height of approximately 11-12 feet. Odyssea was afforded 6,000 square feet in the rear area of a World War I storage shed (Hangar A, B and C) that has a total of 60,000 square feet of space. PRPA has refused to afford Odyssea any further exclusive office space in that storage shed.[2]

On the other hand, the facilities of Odyssea's competitor, Island Stevedoring, Inc., contain 99% of the open land at Pier D and a transit shed commonly known as "Shed D." The contract between PRPA and Island gives it 83,000 square feet of space and 17,000 square feet of "pubic space," purportedly for the movement of cargo in two aisles.

In addition, Odyssea discovered Island had possession of at least two other PRPA facilities that had not been disclosed by PRPA. Both PRPA and its counsel denied the existence of a third facility from March 4, 2003 to July 2, 2003. Odyssea provided clear evidence of this facility, commonly known as the "Truck Terminal," on June 12, 2003.[3]

A survey conducted in March, 2003 showed inconsistencies in the measurements of Shed D. Odyssea argues this survey disclosed that Odyssea is paying ten times more for covered space than Island. Odyssea alleges the surveyors were barred from entering Shed D and the doors were secured by Island representatives before more discovery could be obtained.

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[2]An interior survey of Shed D has not been disclosed by PRPA.

[3]See photographs of the Truck Terminal as well as identification of one of the occupants - AAA Cooper Transportation. Island is the landlord for this facility.

A review of the lease contract for Shed D, between PRPA and Island, reveals that the rent is stated as a "lump sum" rather than broken out as is the usual practice of PRPA. This lump sum is broken out to show that Island pays the sum of $148,439.23 annually for 108,000 square feet of space at Shed D. Island is not paying the same amount (on a cubic foot capacity basis) as Odyssea. Odyssea pays $2.50 per square foot of exclusive space and Island pays $1.37. When the capacity factor is applied, it appears that Island pays even less.

One of the issues is about usage and control of Shed D. It appears that Island or its affiliate has full use and control of Shed D. PRPA denies this fact. Odyssea maintains PRPA has documents that will establish "how much" of Shed D is in the exclusive possession and use of Island or its affiliate. PRPA maintains that any form of sub-leasing is prohibited at the Port.

Odyssea submits that PRPA has been uncooperative in the discovery process, has failed to produce documentation in its responses and unwilling to cooperate with other discovery requests. Odyssea maintains there are documents that support the lack of credibility of PRPA's witnesses and directly involve Odyssea's calculation of its damages in this proceeding. Odyssea seeks intervention in obtaining necessary discovery from PRPA.

Odyssea argues that cases involving unjust discrimination involve the production of information that is relevant to the "reasons" for such discrimination. Such information forms the basis of a typical respondent's "defense" and justification for a respondent's actions. Odyssea alleges that PRPA has failed to produce requested documentation in the discovery process that would support Odyssea's proof of the discrimination.

Odyssea submits discovery showed Mr. Edwin Rodriguez, Chief of the Maritime Bureau of the Port, issued three letters to Odyssea that contained factual misrepresentations. [4] Odyssea maintains Mr. Rodriguez's representations were known falsehoods or issued with such total disregard for accuracy that wilfulness might be presumed. Odyssea argues that a hearing is necessary to discover the truth of the matters asserted and resolve genuine issues of material fact.

JOINT STIPULATION OF FACTS

On December 13, 2003, the parties agreed to a Joint Stipulation of 159 Facts with Exhibits 1 through 58.[5] On September 16, 2004, the parties agreed to an additional ten exhibits.[6]

PRPA'S MOTION FOR SUMMARY JUDGMENT

On December 22, 2003, PRPA filed an extensive, 71-page, Motion for Summary Judgment with 50 attachments. PRPA moved for dismissal of Odyssea's Complaint with prejudice.[7] PRPA argued that the material facts were not in dispute.

PRPA alleged that the depositions of Odyssea's principals, joint stipulations of fact, and uncontested evidence showed Odyssea had no damages proximately caused by the acts or omissions

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[4]See letters from Mr. Edwin Rodriguez dated April 30, 2001, October 30, 2001 and February 13, 2002.

[5]See Joint Stipulation of Facts, dated December 13, 2003.

[6]See Hearing Exhibit 1, dated September 16, 2004.

[7]See Respondent's 71-page Motion for Summary judgment filed on December 22, 2003, with 39 attachments and 11 partial deposition attachments, as follows: Stephen Reed (Dec. 3, 2002), Augusto C. Rios - President of Odyssea (Dec. 4, 2002, March 15, 2003 and sept. 4, 2003), Julio Ortiz - Vice President of Odyssea (Dec. 5, 2002 and March 15, 2003), Edwin Rodriguez - PRPA Chief of Maritime Bureau (June 4, 2003), Victor Carrión (June 5, 2003), Orlando Rubert (June 6, 2002), and Jose Guillermo Barquero - PRPA General Counsel 2001, PRPA Executive Director from Dec. 2001 to May 2003 (Vol. I and Vol. II - August 26, 2003).

of which it complains. PRPA submitted that Odyssea had been largely provided the facilities it requested and its business had grown. Finally, PRPA argued that the actions of PRPA had been reasonable.[8]

PRPA reasoned summary judgment was appropriate because Odyssea's Complaint was based on facts that it had not been granted preferential berthing at Piers 15 and 16, was charged for exclusive use warehouse space on the basis of square feet of floor space (rather than by volume), and other warehouses at the Port were better than the warehouse Odyssea leased.[9]

A. The Port of San Juan, Puerto Rico

This dispute concerns the use of the Port. The Port is bounded to the north by Old San Juan and the San Antonio Channel, to the east by an area know as "Isla Grande," and to the south by an area known as "Puerto Nuevo." The issues in this proceeding center on the Isla Grande area, and the Old Navy Base located there.

Companies involved in the general cargo trades in the Port include at least five stevedoring entities: Odyssea, Island Stevedoring, Inc. ("Island"), Transcarribean Maritime Corp. ("Transcaribbean"), International Shipping Agency, Inc. ("Intership"), and Luis Ayala Colon Successores, Inc. ("Ayala").

Also using the Port are at least four general cargo carriers who operate their own terminals: Sea Star Line, LLC, ("Sea Star"), Horizon Lines, LLC, ("Horizon"), Crowley Maritime Corporation, ("Crowley"), and Trailer Bridge, Inc. ("Trailer Bridge"). In addition, HUAL AS Puerto Rico Line

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[8] *Id.* at 2.

[9] *Id.* at 2.

("HUAL"), an automobile roll-on, roll-off ("Ro-Ro") carrier, opened an automobile transhipment terminal in the Isla Grande area of the Port in 2000.

B. The Puerto Rico Ports Authority

The Commonwealth of Puerto Rico established the Puerto Rico Ports Authority ("PRPA") as a public corporation with a legal existence and personality separate and apart from those of the Government and any of its officials.[10] PRPA is operated according to the provisions of the Ports Authority Organic Act.[11]

PRPA is governed by a Board of Directors who are appointed by the Governor. The Board of Directors include Commonwealth Public officials and a private citizen. The Chief Executive Officer of PRPA is its Executive Director who is elected by the Board of Directors and serves at their pleasure.[12]

The purpose of PRPA is to develop and improve, own, operate, and manage any and all types of air and marine transportation facilities and services, as well as to establish and manage mass marine transportation systems in, to, and from the Commonwealth of Puerto Rico on its own or in

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[10]L.P.R.A. § 333 ... The debts, obligations, contracts, bonds, notes, debentures, receipts expenditures, accounts, funds, undertakings and properties of the Authority, its officers, agents or employees, shall be deemed to be those of said government, controlled corporation, and not those of the commonwealth of Puerto Rico, or any offices, bureau, department, commission, dependency, municipality, branch, agent, officials or employees, thereof.

[11]L.P.R.A. §§ 331-352 may also be referred to as the "Ports Authority Organic Act."

[12]L.P.R.A § 334.

coordination with other government, corporate or municipal entities, and make available the benefits thereof in the most extensive and least costly manner.[13]

PRPA is an independent public corporation. It has its own budget, employees and board of directors. Under PRPA's Enabling Act, PRPA has a legitimate corporate existence and the right to sue and be sued.

C. The Golden Triangle Project

In 1996, the Commonwealth Government of Puerto Rico announced its vision for revitalization of the tourism industry in San Juan, Puerto Rico, including the Port of San Juan. Since the cruise and tourism industries represented driving forces for the future economic development of Puerto Rico, a plan was developed to encourage and facilitate those industries.[14] The San Juan Master Plan proposed the development of aesthetically appealing retail, residential and cruise ship facilities along the San Antonio Channel creating a "Golden Triangle" with other points in the city.

PRPA maintains that in the spring of 2000, the Governor of the Commonwealth of Puerto Rico, Pedro Rosselló, directed PRPA to expedite the clearing of certain areas along the San Antonio

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[13]L.P.R.A.§ 336 ... Thereby promoting the general welfare and increasing commerce and prosperity; and the Authority is granted, and shall have and may exercise all rights and powers that are necessary or convenient to carry out the aforesaid purposes, including the following, but without limiting the generality of the foregoing:

(a) To have perpetual existence as a corporation;

©) to prescribe, adopt, amend, and repeal bylaws, governing the manner in which its general business may be conducted and the powers and duties granted to and imposed upon it by law may be exercised and performed;

(d) to have complete control and supervision of any undertaking constructed or acquired by it including the power to determine the character of and necessity for all its expenditures and the manner in which they shall be incurred, allowed and paid, without regard to the provisions of any laws governing the expenditure of public funds, and such determination shall be final and conclusive upon all officers of the Commonwealth of Puerto Rico, and to prescribe, adopt, amend, and repeal such rules and regulations as may be necessary or proper for the exercise and performance of its powers and duties or to govern the rendering, sale, or exchange of transportation service or facilities; and

(e) to sue and be sued.

[14]See Port of San Juan Strategic Master Plan, ODY000149 (May 1996).

Channel. The Pier 9 Warehouse that was leased by Odyssea was located within such areas. PRPA removed the warehouses and destroyed Port facilities at Puerto de Tierra, from Pier 8 to Pier 14, along the San Antonio Channel in Old San Juan.

The destruction of these old maritime facilities cleared the area for cruise ship operations and parking. PRPA demolished twenty-eight structures that appear to have been 60% of PRPA's total warehouse facilities in the Port of San Juan, totaling 480,000 square feet of floor space, to create "parking"for the Regatta 2000 event.

PRPA stipulated that at the time it demolished its own facilities it had no arrangements or contracts in place for future usage of the involved lands and piers.[15] The tenants of Puerto de Tierra and their operations were relocated to the Old Navy Base in approximately April of 2000.

PRPA argues that Odyssea's attempt to challenge the authority of the Governor of Puerto Rico with respect to the Commonwealth's economic development underscores the application of the Eleventh Amendment Sovereign Immunity in this case.[16]

PRPA'S ARGUMENT FOR SOVEREIGN IMMUNITY

PRPA invokes the defense of Sovereign Immunity under the Eleventh Amendment of the U.S. Constitution against the allegations presented in Odyssea's Complaint. PRPA maintains the removal of the facilities at Puerto de Tierra and the relocation of its tenants to the Old Navy Base was due to the implementation of the Golden Triangle Project and therefore a governmental action.

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[15] See Joint Stipulation of Fact, Numbers 102 and 103.

[16] Respondent's Reply to Complainant's Opposition to Motion for Summary Judgment, page 13.

PRPA argues that in 1998 the former Commonwealth Governor of Puerto Rico, Pedro Rosselló, ordered the removal of the existing warehouses at Puerto de Tierra along the San Antonio Channel as part of the Golden Triangle Project.[17] PRPA alleges it complied with the Governor's orders and acted as an "arm the state." PRPA maintains the actions complained about by Odyssea were the result of the Governor's order. Therefore, PRPA claims it has Sovereign Immunity and Odyssea's Complaint should be dismissed with prejudice.

PRPA's allegation that Governor Rosselló ordered PRPA to remove these warehouses is supported by a copy of a speech Governor Rosselló gave at the Caribe Hilton Hotel & Casino on November 18, 1998.[18] PRPA also offers the deposition of Victor Carrion, former Chief of the Maritime Bureau of the Ports Authority as evidence that Governor Rosselló ordered the Port Authority to destroy its facilities at Puerto de Tierra from Pier 8 to Pier 14.

Mr. Carrion testified, at his deposition, that he attended a meeting with Governor Rosselló regarding the Golden Triangle Project in June 1998 where the former Governor stated he wanted the old maritime facilities cleared for cruise ship operations.

Mr. Carrion also stated, during his deposition, that he attended a meeting with aides of Governor Rosselló and several Commonwealth officials at the Ports Authority in approximately November of 1998. At that meeting, Mr. Hector Rivera, the Executive Director of the Ports

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[17]See Respondent's Motion for Summary Judgment, page 12.

[18]See Keynote address by Hon. Pedro Rosselló, Governor of Puerto Rico, delivered at Hilton Incentive and Meeting Management Summit, Caribe Hilton Hotel & Casino, San Juan, Puerto Rico, November 18, 1998.

Authority, and others were informed about the Governor's orders to demolish the facilities along the waterfront of the San Antonio Channel.[19]

ODYSSEA'S ARGUMENT AGAINST SOVEREIGN IMMUNITY

Odyssea argues PRPA must do more than simply allege it is an "arm of the state" of the Commonwealth of Puerto Rico; it must establish the factual and legal points. Odyssea cites the Circuit Court of Appeals of Puerto Rico's opinion in *Trans-Caribbean Maritime Corp. v. Commonwealth of Puerto Rico,* 2002 PR App. LEXIS 595 (March 27, 2002), that specifically held the activities of PRPA, relating to the removal of tenants of the Puerto de Tierra area of the Port of San Juan in April 2000, was an issue of contract and a propriety matter between PRPA and its complainant tenant, Transcaribbean Maritime Corp. Furthermore, the *Trans-Caribbean Maritime* court held that sovereign immunity did not apply to PRPA which was a public corporation, established pursuant to the laws of Puerto Rico.[20]

Odyssea submits PRPA only offered hearsay and double hearsay evidence that former Governor Rosselló ordered PRPA to demolish Piers 8 through 14 and relocate the tenants of Puerto de Tierra to the Old Navy Base as part of the Commonwealth's Golden Triangle Project and Regatta 2000. PRPA has not provided any written orders from former Governor Rosselló to support the allegation he ordered PRPA to destroy its facilities. In addition, PRPA has not provided any records that the Board of Directors ever adopted any resolution authorizing this action. Further, there is no

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[19] See Deposition of Mr. Victor M. Carrion, former Chief of the Maritime Bureau of the Ports Authority, dated June 5, 2003.

[20] *Trans-Caribbean Maritime Corp. v. Commonwealth of Puerto Rico,* 2002 PR App. LEXIS 595 (March 27, 2002). PRPA was a named party in that case. See *Trans-Caribbean Maritime Corp. v. Autoridad de los Puertos,* Civil No. KAC 00-7367(507).

record former Governor Rosselló was even a member of the Board of Directors for PRPA. Finally, PRPA has not provided any legal authority that the Puerto Rican government could require PRPA to destroy its facilities.[21]

Odyssea maintains that PRPA does not show where Odyssea's claims are premised upon the Golden Triangle Project or Regatta 2000. Odyssea alleges PRPA lied to Odyssea personnel about what was going to occur with respect to the repair of the facilities at the Old Navy Base. Odyssea's allegations are only directed against the actions of PRPA, not against the authority of the Governor of Puerto Rico with respect to the Commonwealth's economic development.[22] Finally, the record does not show Odyssea premised any of its claims upon government action regarding the Golden Triangle Project or Regatta 2000.[23]

APPLICABLE FACTS IN DISPUTE.

Item 1. Whether PRPA has an agreement with HUAL AS for the exclusive use of El Pedregal

A. In 2002, Odyssea requested the use of El Pedregal, an open area of approximately six acres, but PRPA refused Odyssea's request. In February 2003, PRPA erected a sign announcing it was commencing construction of a New Terminal for HUAL Puerto Rico Line in Isla Grande. The sign stated the Terminal was being built by PRPA at a cost of almost one half million dollars. [24]

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[21]Complainant's Memorandum in Opposition to Respondent's Motion for Summary Judgment, page 4.

[22]Respondent's Reply to Complainant's Opposition to Summary Judgment, page 13.

[23]Complainant's Memorandum in Opposition to Respondent's Motion for Summary Judgment, page 4.

[24]Odyssea Opposition Statement of Facts, dated 2-11-04, pages 9-10, Exhibit 11 – See Photograph #73 regarding notice of port authority:

Estado Libre Asociado de Puerto Rico
Departmento de Transportación y Obras Públicas

(continued...)

HUAL AS has 100% usage of this new terminal. It has built a security fence around the facility and has locks on the access gate. The facility has a large sign stating HUAL TERMINAL.[25]

Further, HUAL AS Puerto Rico Line ("HUAL") has published brochures in which the El Pedregal area is shown and which represents that it is a part of HUAL's "exclusive" facilities in San Juan, Puerto Rico.[26] PRPA denies any agreement with HUAL for exclusive use of El Pedregal, but representatives of Puerto Rico Line have allegedly told Odyssea that an agreement exists.

B. PRPA denies leasing the area to HUAL. PRPA does not dispute that the sign was erected or that HUAL is using recently paved land at Pier 15 -- under the terms of the tariff. PRPA agrees that HUAL proposed making improvements to the area, but the negotiations between the parties have not resulted in an agreement. PRPA maintains that the HUAL Brochure and the PRPA sign do not represent competent evidence of an exclusive use agreement.[27] In addition, PRPA also argues that Mr. Ortiz's affidavit amounts to a statement that:

> ... Ortiz was told by unidentified persons that the Ports Authority had agreed with HUAL to construct and pave an area, and that HUAL would provide lighting. In addition to the obvious unreliability and inadmissability of such an anonymous hearsay statement, it neither contradicts any facts set forth by Respondent, nor ... contradicts the sworn testimony that PRPA has not leased the area to HUAL.
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> There is no dispute that HUAL proposed making improvements to the area. . . . Since HUAL has offered to make significant investment and improvements to this facility, just as it did in its original facility, these rational transportation related factors would provide a reasonable basis for the Ports Authority to award an

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[24] (...continued)
Autoridad de las Puertos
NEW PARKING LOT FOR HUAL TERMINAL PR LINE ISLA GRANDE
INVERSIÓN: $497,788.00

[25] *Id.* at photograph #74.

[26] *Id.* at 2.

[27] Respondent's Reply to Complainant's Opposition to Respondent's Motion for Summary Judgment, pages 17-18.

exclusive use agreement to HUAL and not to Odyssea, which has steadfastly refused to offer to make any improvements to its facilities.[28]

PRPA maintains there is no genuine issue of material fact because it "admits to providing preferential berthing rights to HUAL and not to Odyssea." PRPA concludes its actions were reasonable because "HUAL made a major investment in the facility, provided a valuable guarantee of minimum wharfage and dockage and brought a transhipment hub to the Port that would have otherwise gone to another Caribbean Island."

Item 2. **Whether PRPA charges $2.50 per square foot for the pier 15 office building warehouse space constitutes a reasonable charge**

A. Odyssea submits that the storage space provided to it by PRPA is located in the rear of the first floor of an office building. It is neither adjacent to a pier nor directly accessible "from the side of a vessel to a warehouse door and floor 'point of rest'".

PRPA charges Odyssea an annual rate of $2.50 per square foot for exclusive use of warehouse space. Odyssea argues that a comparison of the warehouse space for which this rate is supposedly applicable, with Odyssea's office warehouse space, reflects that Odyssea has only 30% of the storage capacity of the "standard" space (using Shed D at Pier D as the comparative space).

Odyssea submits that an analysis of what Odyssea is actually being provided shows that PRPA's $2.50 rate is not reasonable when applied to Odyssea's space. The evidence shows that Island Stevedoring has been provided with the vast majority of the storage space for perishable commodities such as newspaper print rolls (various types). Odyssea alleges that Island Stevedoring

[28] *Id.* at 18-19.

also had use, access and control of an additional facility, the Truck Terminal, which is used for the same purpose.

Odyssea alleges that this situation, for which Odyssea has only one-third the space for the "same" dollars, increases Odyssea's basic costs and impacts Odyssea's ability to compete. Odyssea maintains that PRPA is trying to afford Island Stevedoring an effective monopoly on the storage of newsprint.[29]

B. PRPA argues that the charging of rent for exclusive use space on the basis of square foot of floor space, rather than cubic foot of volume, is reasonable.[30]

Item 3. **Whether PRPA's practice of imposing the same rates for exclusive usage on terminal facilities that are not like in size, kind, quality or capacity, is an unreasonable practice**

A. Odyssea maintains PRPA fails to distinguish between those facilities that are reflective of PRPA's charges, such as: Shed D at $2.50 per square foot compared to Odyssea's facilities that are inferior and offer less space. Odyssea alleges PRPA has not established any form of pricing that takes into account the disparities in facilities. Odyssea maintains this disparate situation could result in inherent discrimination, if the entities that had the "good space and facilities" are able to attract and retain the business based upon facilities alone.

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[29] *Id.* See Point 2, pages 2-3.

[30] Respondent's Reply to Complainant's Opposition to Respondent's Motion for Summary Judgment at 20.

Odyssea submits that the problem of disparate facilities could be patent discrimination. On January 2, 2002, PRPA was given a copy of a letter from Irving Paper that noted conditions of Island's facilities were compared to Odyssea's "public" Hanger space.[31]

B. PRPA submits charging rent for exclusive use space, on the basis of square foot of floor space, rather than cubic foot of volume, is reasonable. PRPA maintains this legal issue is ripe for summary judgment. Additionally, PRPA alleges Odyssea's complaints that the disparities in facilities could harm its business opportunities refers to a claim Odyssea has withdrawn.[32]

Item 4. Whether PRPA began imposing an exclusive use charge on outside covered space and ramp space in retaliation for Odyssea's complaint to the Commission

A. Odyssea filed its Complaint with the Commission in late May 2002. In July 2002, Counsel for PRPA took photographs of Odyssea's facilities in July 2002.

On August 1, 2002, PRPA began charging Odyssea $2.50 per square foot for use of outside covered space on the office building loading dock. The charge was for approximately 7,072 square feet of space and even included charges for "ramp" space. This ramp space only affords access to the building and loading dock. (PRPA only charges twenty-five cents per square foot for identical space at Shed D.)

Odyssea maintains PRPA gave Odyssea no explanation for the additional charges. Odyssea argues that PRPA failed in its obligation to provide notice and an explanation when a new charge is added to an invoice.[33]

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[31]Odyssea's Opposition to Respondent's Motion for Summary Judgment. Point 3, pages 3-4. See also exhibit photographs of Shed D and the Truck Terminal compared with the Hanger warehouses at Pier 15 and 16 office building storage space show Odyssea's facilities are inferior.

[32]Respondent's Reply to Complainant's Opposition to Respondent's Motion for Summary Judgment, page 20.

[33]Complainant's Opposition to Respondent's Motion for Summary Judgment. Point 4, page 4.

B. PRPA maintains that Odyssea misrepresented the nature of the space leased to Island Stevedoring which is preferential use (versus exclusive use) space, leased at $0.25 per foot. PRPA submits the proposition that exclusive use space is more valuable than preferential use space is not in dispute, and is well-established in the leases attached to the Complaint in this matter. PRPA argues that cargo in preferential areas must be moved after a short time or demurrage will be charged; cargo on an exclusive area may remain indefinitely without demurrage charge.[34]

Item 9. **Whether PRPA made a false representation of fact in its April 30, 2001 correspondence to Odyssea regarding the adoption of a new leasing policy**

Odyssea alleges Mr. Edwin Rodriguez, PRPA Executive Director, issued a letter to Odyssea that denied its April 18, 2001 request for berthing based on a "new" PRPA policy against such arrangements. At Mr. Rodriguez's deposition, he admitted that the Board of Directors had not established the "Policy" he announced to Odyssea in his April 30, 2001 letter. Mr. Rodriguez further acknowledged that he had not consulted with the Board or the Executive Director regarding the involved Policy:

> Mr. Rodriguez admitted he unilaterally undertook the action and that this "Policy" was only being applied and enforced at Piers 15 and 16 where Odyssea conducted operations and sought the space and berthing. Odyssea was the only stevedoring company whose operations were impacted by this "Policy."[35]

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[34]Respondent's Reply to Complainant's Opposition to Respondent's Motion for Summary Judgment, page 20-21. See Agreement between Puerto Rico Ports Authority and HUAL AS, AP 00-01-(4)-022 (attachment 5 to the Complaint).

[35]Odyssea's Opposition to Respondent's Motion for Summary Judgment. Point 9, pages 7-8.

Item 10. **Whether PRPA made a false representation to Odyssea regarding the level of the warehouse Hanger space at Pier 15 as grounds to refuse another Odyssea request for exclusive space**

PRPA was informed that it was necessary for Odyssea to offer storage space for cargo in order to be competitive for certain types of business in the Port. Specifically, the handling of vessels transporting news print and "paper medium" required the steamship line to offer the consignees storage because the shipments were too large to deliver to a consignee in "one lump." Mr. Rodriguez refused Odyssea's request for exclusive space because of the lack of available space.

When Mr. Rodriquez was questioned about the basis for his representation regarding the lack of warehouse Hangar space at Pier 15, he claimed "someone" had told him. PRPA refused to provide the data and supporting records regarding this matter because it was too burdensome and the records were too voluminous to produce. It was finally adduced at Mr. Rodriguez's deposition that he had no records to support such a representation. In fact, the primary user of the sought after space was Odyssea.[36]

Item 11. **Whether PRPA misrepresented to Odyssea the availability of preferential berthing**

A. Odyssea made a number of requests for preferential berthing. In one situation, PRPA simply said the facility could be shared. PRPA claimed the standards, elements and criteria necessary to obtain preferential berthing were contained in PRPA's tariff —1-5 and the contracts that PRPA had written and provided. The tariff does not mention preferential berthing. The contracts contain integration clauses that preclude any matter of agreement outside the four corners of the documents.

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[36] *Id.* Point 10, page 8.

The HUAL contract included preferential berthing with a revenue guarantee. Odyssea alleges that every vessel using the involved berth had their wharfage and port charges credited to HUAL's account. Odyssea submits the "guarantee" was specious, as well as contrary to precedents of the Commission.

Nevertheless, Odyssea generated enough revenue for the Port that Odyssea would have qualified for the involved minimum guarantee. Mr. Rodriguez stated that "a guarantee equaled preferential berthing." This fact was neither conveyed to Odyssea nor was it written anywhere in any PRPA document. Odyssea alleges the failure of PRPA to disclose this material fact amounts to a material omission of fact. Odyssea certainly was unable to comply with a fact or standard that was neither "public" nor followed by PRPA.[37]

PRPA maintains Items 9, 10 and 11 merely impugn the veracity of PRPA's witnesses PRPA argues Odyssea grievously misstates testimony, and ignores the sworn testimony of its own principals that corroborate the testimony of PRPA witnesses. PRPA submits that Odyssea fails to refer to competent, admissible evidence, but simply provides unsubstantiated argument.[38]

Item 12. Whether PRPA established any rules, regulations, elements, standards and criteria for leasing of terminal facilities and preferential berthing

Odyssea argues that PRPA is obligated to establish just and reasonable regulations regarding the terms for leasing of its facilities along with publishing the regulations. This requirement evokes many issues in this case, such as:

(1) whether there are regulations, if so, where are they located;
(2) whether these regulations provide adequate public notice;

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[37] *Id.* Point 11, page 9.

[38] Respondent's Reply to Complainant's Opposition to Motion for Summary Judgment, page 21.

(3) whether those regulations are sufficiently definitive or are they invalid as being overly vague and ambiguous;
(4) whether these regulations are discriminatory or unfair in their substantive content;
(5) whether those regulations are fairly applied or is there as substantial deviation which amounts to discrimination and an unreasonable practice.

In 1988, the Puerto Rican Legislature enacted the Uniform Administrative Procedure Act. It is applicable to PRPA and requires it to establish public and file its rules, regulations and practices with the Secretary of State for the Commonwealth of Puerto Rico.

Odyssea submits that a check of the records of the Secretary of State reveals that, other than PRPA's tariff, it has not officially filed, published or established any regulations that govern the leasing of its facilities. A review of the tariff shows that it does not provide a basis for the leases which are being entered into by PRPA. [39]

Item 13. **Whether PRPA's policy of treating existing leaseholds of PRPA facilities differently from persons seeking to lease facilities is an unreasonable practice**

PRPA allegedly imposed upon Odyssea unwritten and informal requirements involving(1) bringing "new business" to the island, (2) making a capital investment in PRPA's facilities that would belong to PRPA at the end of any lease, and (3) not affording credit for these capital investments.

Odyssea argues competitors, such as Island Stevedoring–who already had a majority of the available PRPA facilities–had no such obligations. Although PRPA indicated that it used the same "forms" for initial leases and "renewals," Odyssea maintains these lease situations were in fact treated differently. Therefore, Odyssea submits PRPA discriminated against Odyssea while imposing no conditions on the renewal of Island leases.

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[39]Complainant's Opposition to Respondent's Motion for Summary Judgment. Point 12, pages 9-10.

Item 14. **Whether the PRPA demand for capital investment, and therefore putting its facilities out to the highest bidder, constitutes an unreasonable practice**

Odyssca alleges PRPA has threatened to put its facilities "up for bid," because it has demanded capital investment in its facilities. This amounts to an action which is contrary to PRPA's status and common law obligations. Vessel operators are not permitted to "bid" their space with "winner take all."[40]

Item 15. **Whether PRPA's practice of preserving facilities and business for Island Stevedoring while requiring Odyssea to find "new business" to bring to Puerto Rico is unreasonable and creates a monopoly in an existing business**

A. PRPA admits it used unpublished criteria for a party seeking to lease space or facilities from PRPA in which the party was required to generate "new business." This is interpreted by PRPA as to involve business that is "new" to the island economy and would not include any effort by Odyssea to compete for existing business with Island Stevedoring.

Odyssea argues this unpublished criteria amounts to the creation and protection of a monopoly for Island on all existing business. Odyssea cannot compete for that business without adequate facilities and PRPA's actions frustrate competition.[41]

B. PRPA submits Items 13, 14 and 15 raise new allegations and ask whether the actions alleged would be reasonable. PRPA argues that Odyssea fails to support the new allegations with any competent evidence necessary to withstand a motion for summary judgment. To the contrary, PRPA maintains Odyssea's new allegations are based solely on misrepresentations in disregard of

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[40] *Id.* Point 14, page 11.

[41] *Id.* Point 15, page 11.

sworn testimony to the contrary. According to PRPA, none of Odyssea's new allegations cites to or is supported by any competent admissible evidence or legal authority.[42]

Item 16. **Whether PRPA's tariff contains any definite provisions that involve leasing of facilities rather than establishment of tariff rates for the use of PRPA facilities**

Odyssea submits PRPA's tariff references a standard form lease that does not exist, states that it does not apply to PRPA's facilities, and limits leases to back areas and to steamship lines as tenants. Odyssea argues PRPA's tariff is patently defective, not only in content, but in compliance with the basic requirements that are discussed in point number 12.

According to Odyssea, the depositions of Edwin Rodriguez and Jose Baquero reveal PRPA uses criteria that was not contained in the subject tariff, it only identified a general authority provision. Mr. Baquero contended that the provision amounted to absolute "discretion." He also admitted PRPA had no written procedures for the submission, handling, processing or disposition of requests or proposals for the use of PRPA's terminal facilities.

Mr. Rodriquez and Mr. Baquero also admitted that the tariff did not contain any procedures or specific elements and criteria applicable to leasing applications and standards for disposition.[43]

Item 17. **Whether PRPA may be found to have engaged in unjust and unreasonable discrimination in the provision of the facilities themselves.**

A. Odyssea alleges that a comparison of the Island facilities at Pier D and the Truck Terminal with the facilities provided to Odyssea shows unequal treatment. Odyssea claims

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[42]Respondent's Reply to Complainant's Opposition to Respondent's Motion for Summary Judgment, pages 21 and 22. See the undisputed testimony of Mr. Baquero that PRPA applied criteria to evaluate proposals, but did impose requirements.

[43]Complainant's Opposition to Respondent's Motion for Summary Judgment. Point 16, pages 11-12.

discrimination that is two-fold: (1) the "public" facilities that Odyssea has to use and "offer" on a PRPA tariff basis, and (2) the warehouse space contained in the Pier 15 office building.

A Stevedore acts as the loading and unloading agent of a vessel carrier. The law establishes that the stevedore acts in the stead of the carrier by loading and unloading the vessel. The stevedore, as the vessel's agent, has the common carrier duty to provide a safe, secure and convenient place for the consignee to pick up his cargoes and for the consigner to deliver his cargoes.

Hangars A, B, and C at Pier 15 are open to the elements, have no doors, and placing cargoes in these areas is risky. Odyssea argues these facilities do not meet the common law requirements placed on the carrier for protection of cargoes. Odyssea submits PRPA fails in its duty by not addressing the filth, trash, holes in the walls, broken floors, lack of lighting and bad drainage within these facilities.

Odyssea claims the limited facilities at the Pier 15 office building warehouse require additional handling of goods. Odyssea submits that due to a lack of height, these facilities are limited to handle small quantities of cargo, as well as being extra expensive. Odyssea argues that its basic costs are higher due to (1) multiple handling, (2) wear and tear on equipment, (3) necessity of extra stevedoring labor, and (4) inherently higher costs per square foot for storage due to ceiling and pillars.[44]

B. PRPA maintains that Odyssea fails to refer to any competent, admissible evidence that the basic costs associated with the facility it leases are higher than those incurred by others.[45]

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[44] *Id.* Point 17, pages 12-13.

[45] Respondent's Reply to Complainant's Opposition to Respondent's Motion for Summary Judgment, page 20.

Item 18. **Whether PRPA has refused to deal with Odyssea while continuing to enter into leases with other parties**

A. Odyssea maintains PRPA refused to deal with Odyssea. It has a written record of twenty times it discussed the issues herein with PRPA, from June 30, 1999 to August 6, 2003. PRPA allegedly informed Odyssea that PRPA was not going enter into any preferential arrangements, after June, 1999.

At the same time, PRPA was actually negotiating with HUAL, the Puerto Rico Line, about leasing it open areas and preferential berthing. PRPA also entered into leases with Island Stevedoring, Intership agencies, CSX Lines of Puerto Rico, and Grupo Carmelo during the relevant time period.

It appears that PRPA has also expanded its lease with HUAL and given it 100% of the involved space to the exclusion of Odyssea. PRPA only offered Odyssea the use of a garbage dump in an "as is" condition. Odyssea found this offer offensive. [46]

B. PRPA argues Item 18 in its argument regarding Item 1. PRPA submits it had a reasonable transportation-related basis for any of its decisions regarding these issues.

Item 19. **Whether the actions of PRPA in neglecting or refusing to make obvious necessary repairs to the Old Navy Base was part of a policy to protect the business of Island Stevedoring**

A. Odyssea submits that it was common knowledge the facilities at the Old Navy Base required repair. Odyssea alleges PRPA did not make the necessary repairs to the warehouses, including pavement, lighting and weatherproofing. Odyssea argues that it did not have the ability

[46] *Id.* Point 18, pages 13-14.

to compete for perishable break bulk cargoes without these repairs. Odyssea risked stacking paper rolls in its equipment storage areas in an effort to compete for any business.[47]

B. PRPA argues that it did make repairs to facilities at Pier 15, including repairs it made to remedy damage caused by Odyssea personnel and a hurricane. Furthermore, PRPA maintains that Odyssea has no basis to allege PRPA failed to make necessary repairs to the Old Navy Base because Odyssea accepted the premises in an "as is" condition with full knowledge of the conditions.[48]

PRPA'S ARGUMENT AGAINST ODYSSEA'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

PRPA argues that Odyssea's recitations of the Joint Stipulations of Fact are inaccurate in many instances, but the inaccuracies are largely irrelevant. PRPA submits that although Odyssea's Statement of Issues consists of 25 points it contends are in dispute, it fails to raise a genuine issue of material fact. Therefore, summary judgment must be granted in favor of PRPA.[49]

PRPA argues that Odyssea invokes ad hominem attacks on counsel, labels the officials of the Ports liars, continues to decry discovery decisions by Judge Rosas and Judge Kline, and otherwise offers unsupported arguments; that Complainant failed to cite competent evidence for its assertions; that, moreover, Complainant does not dispute its utter lack of competent evidence of damages incurred; and that, rather, Complainant states, "since Odyssea has shown violations, discussions of the damages becomes irrelevant." However, Complainant cites no authority to support this proposition. Therefore, the Opposition fails to raise a genuine issue of material fact.

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[47] *Id.* Point 19, page 14.

[48] Respondent's Reply to Complainant's Opposition to Motion for Summary Judgment, page 22.

[49] *Id.* at pages 1-2.

PRPA appears to be under the impression that if a "Complainant fails to provide competent evidence of damages incurred by the alleged wrongdoing of a Respondent, a Complainant cannot prove any of its claims and summary judgment must be granted." [50]

CONCLUSIONS

The Federal Maritime Commission ("Commission") has subject matter jurisdiction over the issues in the Complaint because it alleges violations of Sections 10(d)(1), 10(d)(3) and 10(d)(4) of the Shipping Act of 1984, 46 C.F.R. 501.2. The U.S. Congress enabled the Commission to administer the Shipping Act through 46 U.S.C. Chapter 36, International Ocean Commerce Transportation. The purposes of the Shipping Act are declared in Sec. 1701.[51]

The Complaint was filed pursuant to section 11(a) of the Shipping Act, 46 U.S.C. App. Sec. 1710(a). PRPA is a marine terminal operator within the meaning of section 3(14) of the Shipping Act of 1984, 46 U.S.C. App. Sec. 1702(14). Thus the Commission has jurisdiction over the issues in this case.

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[50] *Id.* at 2.

[51] The purposes of the Shipping Act are declared in Sec. 1701:

> (1) to establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs;
> (2) to provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible in harmony with, and responsive to, international shipping practices;
> (3) to encourage the development of an economically sound and efficient United States-flag liner fleet capable of meeting national security needs; and
> (4) to promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.

The rules in 46 C.F.R., Subpart A, Sec. 502, govern, in part, the procedure before the Commission. The rules will be construed to secure the just, speedy, and inexpensive determination of every proceeding. 46 C.F.R. 502.1.

In proceedings pursuant to 46 C.F.R. 502, for situations that are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent they are consistent with sound administrative practices. 46 C.F.R. 502.12.

PRPA'S MOTION FOR DISMISSAL BASED ON SOVEREIGN IMMUNITY

The Eleventh Amendment of the U.S. Constitution bars a federal court suit against a state without its consent. Puerto Rico has been treated like a state for the purposes of the Eleventh Amendment.[52] In particular, the court in *Puerto Rico Ports Authority v. M/V Manhattan Prince*, 897 F.2d 1, 10 (1st Cir. 1990), addressed the issue of whether Puerto Rico is entitled to Eleventh Amendment protection and held that:

> After examining the pertinent statutes, we conclude that whether the PRPA is entitled to eleventh amendment protection depends upon the type of activity it engages in and the nature of the claim asserted against it. The specific question here is whether the PRPA's relationship with ship pilots is a proprietary function or one exercised as an arm of the state.

PRPA is incorrect, however, that as a public corporation, acting as a marine terminal operator, it is entitled to claim such immunity.

The issue of whether PRPA has sovereign immunity barring the Complaint under the Eleventh Amendment of the U.S. Constitution has been squarely rejected by the U.S. Court of Appeals for the First Circuit, which has jurisdiction over Puerto Rico. In *Royal Caribbean Corp.*

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[52] *Puerto Rico Ports Authority v. M/V Manhattan Prince,* 897 F.2d 1, 10 (1st Cir. 1990) ("That [the principles of sovereign immunity] apply to the Commonwealth of Puerto Rico is beyond dispute") (internal citations omitted).

v. Puerto Rico Ports Authority, 973 F.2d 8 (1st Cir. 1992), the court found "[s]everal critical factors that suggest the Ports Authority, in running and maintaining the docks, is not entitled to Eleventh Amendment Immunity."[53] The relevant factors include:

> local law and decisions defining the nature of the agency involved; whether payment of any judgment will come out of the state treasury; whether the agency is performing a governmental or proprietary function; the agency's degree of autonomy; the power of the agency to sue and be sued and enter into contracts; whether an agency's property is immune from state taxation and whether the state has insulated itself from responsibility for the agency's operations.[54]

The primary factors considered by the *Royal Caribbean* court in reaching this conclusion were the commercial, rather than the governmental, nature of owning, operating, and managing transportation facilities, the financial independence of PRPA, and the operational autonomy of the PRPA. *Id.* at 10-11. The Eleventh Amendment jurisprudence that has developed since *Royal Caribbean* reaffirms its result and makes it even clearer PRPA is not an arm of the state entitled to immunity in this case.

In *Fresenius Medical Care Cardiovascular Resources, Inc. v. Puerto Rico and the Caribbean Cardiovascular Center Corp.*, 322 F.3d 56 (1st Cir. 3003), the court stated that there was extensive reason for restraint when deciding whether an entity had state sovereignty:

> "[W]here an entity claims to share a state's sovereignty and the state has not clearly demarcated the entity as sharing its sovereignty, there is great reason for caution. It would be every bit as much of an affront to the state's dignity and fiscal interests were a federal court to find erroneously that an entity was an arm of the state, when the state did not structure the entity to share its sovereignty." [55]

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[53] Complainant's Opposition to Respondent's Motion for Summary Judgment, at 10. PRPA's lack of immunity has previously been recognized in FMC proceedings. See *HUAL AS v. Puerto Rico Ports Authority*, No. 03-01, 29 S.R.R. 1264 (ALJ Mar. 3, 2003) ("the 1st Circuit Court of Appeals, which has jurisdiction over Puerto Rico, has held that the PRPA is not immune from private complaint suits when operating a port,...").

[54] *Royal Caribbean Corp. v. Puerto Rico Ports Authority,* 973 F.2d 8 (1st Cir. 1992), at 9.

[55] *Fresenius Medical Care,* at 63.

PRPA is wrong in its assertion that the question of whether the activity at issue is a "governmental or proprietary function" is now the "paramount factor" in determining whether an entity is an arm of the state. (Motion to Dismiss at 11 n. 36, citing *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 765 (2002).)

The Court, in *South Carolina*, did not address the issue of whether South Carolina State Ports Authority was an arm of the state. The Court in *South Carolina* did not discuss the test for making such a determination, let alone rule that the governmental or proprietary function factor should be paramount when applying any such new test. What *South Carolina* did hold was that the purpose of the Eleventh Amendment is not only to protect state treasuries, but also to protect the dignity of the state.[56]

The holding in *South Carolina* is consistent with *Royal Caribbean* and subsequent Eleventh Amendment cases that continue to balance a variety of factors when determining whether an entity is an arm of the state. Indeed, the First Circuit has noted this dual purpose of the Eleventh Amendment, and has made it clear that fulfilling its purpose does not mean favoring immunity.

With respect to the test itself, the First Circuit analysis has evolved into a two-step process which looks first at whether the state has clearly structured the entity to share in its sovereignty, and second at whether damages would be paid from the state treasury.[57]

In *Redondo Construction Corp. v. Puerto Rico Highway and Transportation Authority*, 357 F.3d 124, 126 (1st Cir. 2004), the court reformed its arm-of-the-state analysis for Eleventh

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[56] *Id.* at 765.

[57] *Fresenius Med. Care Cardiovascular Resources Inc. v. Puerto Rico & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56 (1st Cir. 2003), cert. denied, _____U.S._____, 124 S.Ct. 296, 157 L.Ed.2d 142 (2003).

Amendment immunity in response to intervening Supreme Court precedent and elaborated on the *Fresenius*[58] two-part test as follows:

> Under *Fresenius*, a court must first determine whether the state has indicated an intention -- either explicitly by statute or implicitly through the structure of the entity -- that the entity shares the state's sovereign immunity. If no explicit indication exists, the court must consider the structural indicators of the state's intention. If these point in different directions, the court must proceed to the second stage and consider whether the state's treasury would be at risk in the event of an adverse judgment.

In fact, the statutes in the present case explicitly state that the Commonwealth did not intend for PRPA to share in its sovereignty. Indeed, the Commonwealth explicitly granted PRPA "the power to sue and be sued."[59] The relevant statute also provides for PRPA to have "a legal existence and personality separate and apart from those of the Government and any officials thereof."

Further, the implicit structural factors as weighed in *Royal Caribbean* (e.g., commercial functions, independent financial existence, and operational autonomy) continue to require a finding of no sovereign immunity. Since application of the first part of the test weighs so heavily in favor of denying immunity, it is not necessary to turn to the second part of the test.

However, if the second step of the test is considered, the results are conclusive that the treasury of the Commonwealth of Puerto Rico would not be at risk because of the actions of PRPA. The relevant statute provides that:

> The debts, obligations, contracts, bonds, notes, debentures, receipts, expenditures, accounts, bonds, undertakings and properties of the Authority, its officers, agents or employees, shall be deemed to be those of the said government-controlled corporations, and not those of the Commonwealth of Puerto Rico, or any office,

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[58] *Fresenius* applied the two-stage framework of *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 115 S.Ct 394, 130 L.Ed.2d 245 (1994), to the question of whether a special purpose public corporation established by a state should enjoy Eleventh Amendment immunity. *Fresenius,* 322 F.3d at 64-68.

[59] L.P.R.A. Title 23, Sec. 336(e) .

bureau, department, commission, dependency municipality, branch agent, officials or employees thereof. [60]

It is clear that the treasury of the Commonwealth of Puerto Rico would not be at risk if a judgment was rendered against PRPA. Accordingly, application of the proper two-part tests in *Fresenius* requires that PRPA not be treated as an arm of the state entitled to Eleventh Amendment immunity. As such, PRPA is not entitled to Eleventh Amendment immunity because it is clear that the state's treasury is not at risk.[61]

The finding in *Royal Caribbean* that owning and operating a marine terminal is commercial in nature still stands even if the sole inquiry were the nature of the activities at issue, as PRPA contends. In an effort to avoid this clear precedent, PRPA argues that it is not acting in its capacity as a marine terminal operator in its dealings with Odyssea. PRPA claims to be engaging in the "regulation of land use" because certain allegations in the Complaint relate to, or can allegedly be excused, by activities undertaken by PRPA in relation to port development activities.

PRPA fails to explain, however, how engaging in port development equates to "regulating land use." PRPA neither cites any regulation it has issued pertaining to land use, nor points to any authority for it to issue such regulations. PRPA compares its port development activities to promotional harbor development projects in other cities. Once again, PRPA cites nothing to indicate that the other harbor development operations constitute land use regulation on the part of their respective port authorities. Property development is a distinct commercial activity, not a governmental activity.

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[60]P.R. Laws Ann. Tit.23, Sec. 336; see also Royal Carribean, 973 F. 2d at 10 ("The record indicates that the Ports Authority, not the Commonwealth treasury would likely pay an eventual judgment in the plaintiff's favor").

[61]See *Fresenius,* 322 F.3d, at 65, 72.

PRPA's assertion that it is part of the Government of Puerto Rico and its decision making is therefore "inherently governmental" is just not supported by the facts or the law. PRPA was not subject to the actions of the Governor or the Government of Puerto Rico in this case.[62]

PRPA's defense stems from an alleged order of the Governor that PRPA should demolish Piers 8 through 14 and relocate the tenants and their operations to the Old Navy Base in order to implement the Golden Triangle Project. There is no competent evidence PRPA acted as an arm of the state when it destroyed these port facilities. Furthermore, Odyssea does not claim the former Governor of Puerto Rico or the Government had anything to do with the alleged unlawful actions of PRPA in leasing Port facilities.

PRPA attempts to place responsibility on Government officials of Puerto Rico for the allegations in the Complaint, as well as for taking Odyssea's leased property at Puerta de Tierra. Many of the allegations and issues in the Complaint occurred after Odyssea was relocated to the Old Navy Base and had nothing to do with the Golden Triangle Project. PRPA can neither prove its alleged unlawful actions were ordered by the Puerto Rican government, nor prove it is entitled to Sovereign Immunity. Therefore, the Complaint is not barred by the Eleventh Amendment of the U.S. Constitution.

MOTION FOR SUMMARY JUDGMENT

The Complaint alleges violations of sections 10(d)(1), 10(d)(3) and 10(d)(4) of the Shipping Act of 1984. In ruling upon any aspects of PRPA's Motion to dismiss, the Administrative Law Judge must construe the allegations in the Complaint in the light most favorable to Odyssea. The

[62]Respondent's Motion for Summary Judgment, page 11.

Complaint cannot be dismissed unless it appears beyond a doubt that Odyssea cannot prove a set of facts which will entitle it to relief.

The Complaint can only be dismissed for failure to state a claim if, assuming all facts alleged by Odyssea are true, there is no legal ground upon which relief may be granted. Reasonable doubts are to be resolved in favor of Odyssea.[63]

In summary judgment motions, the Administrative Law Judge is supposed to consider the evidentiary material submitted, in addition to the naked complaint. The Administrative Law Judge must decide if the complainant has submitted enough materials to show there is a genuine issue of material fact that would justify continuing into a trial or otherwise continuing with litigation.[64]

Motions for summary judgment require the Administrative Law Judge to look beyond the pleadings to determine whether there is evidence under the applicable law conforming with a viable theory under the law, and if there are genuine issues of material fact that usually must be resolved at trial. In ruling upon any aspects of PRPA's motion to dismiss, the Administrative Law Judge must construe the allegations in the Complaint in the light most favorable to the nonmoving party.

The summary judgment procedure has been used more frequently by courts following a trio of Supreme Court decisions rendered in 1986.[65] There are circumstances, however, when issuance of a summary judgment may be premature or inappropriate because the issues require the record to

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[63]See *Western Overseas Trade and Development Corp. v. Asia North America Eastbound Rate Agreement,* No. 92-06, 26 S.R.R. 1066, 1075 (ALJ Aug. 16, 1993); see also *Crowley Liner Services Inc. v. Puerto Rico Ports Authority,* No. 00-02, 29 S.R.R. 394, 405-406 (Sept. 20, 2001), and cases cited therein.

[64]*Crowley Liner Services, Inc. v. Puerto Rico Ports Authority*, 29 S.R.R. 394, 406 (2001).

[65]The three 1986 Supreme Court cases are: *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp., et al.*, 475 U.S. 574; *Celotex Corp. v. Catrett*, 477 U.S. 317; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242.

See also the discussions in *McKenna Trucking Co., Inc. v. A. P. Moller-Maersk Line and Maersk , Inc.,* 27 S.R.R. 1045, 1054, *et seq.* (ALJ) 1997; *NPR, Inc. v. Board of Commissioners of the Port of New Orleans,* 28 S.R.R. 1011, 1014-1017 (ALJ 1997); *International Association of NVOCCs v. Atlantic container Line,* 25 S.R.R. 577, 578-579 (ALJ 1989).

be more fully developed. Thus, in *11 Moore's Federal Practice*, sec. 56.32(6), the authority states at 56-268:

> There is a long-established doctrine holding that a court may deny summary judgment if it believes further pretrial activity or trial adjudication will sharpen the facts and law at issue and lead to a more accurate or just decision, or where further development of facts may enhance the court's legal analysis.

In a footnote following the above quotation, the authority cites *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256 (1948), where the court exercised discretion to deny summary judgment in a case of statutory interpretation because of the importance of the case and the view that a trial would better illuminate issues of law and policy.

Elsewhere, this authority comments on the fact there is still discretion to deny summary judgment in cases such as *Kennedy v. Silas Mason Co.,* notwithstanding the 1986 Supreme Court decisions that encouraged greater use of the summary judgment procedure even in complicated cases, as follows:

> ...[T]he discretion to deny doctrine must be regarded as remaining good law. As noted above, the *Anderson v. Liberty Lobby* Court was aware of the doctrine and spoke to the issue. Instead of abrogating the doctrine, the *Liberty Lobby* Court endorsed judicial discretion to refrain from summary judgment notwithstanding the generally favorable attitude toward summary judgment reflected in the Court's 1986 trilogy. (Footnotes omitted.)[66]

Other authorities recognize that the issuance of summary judgments is improper in cases where the issues are not only complex or novel, but the record has been inadequately developed regardless of the three 1986 Supreme Court decisions. Thus, in Schwarzer, Hirsch and Barrans, *Summary Judgment Motions,* 139 F.R.D. 441, 480 (1982), the authors state that:

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[66]See *11 Moore's,* sec. 56.32(6) at 56-272-273.

> In *Anderson v. Liberty Lobby*,[67] . . . the Court recognized that there may be cases where there is no manifest material factual dispute but the trial judge nevertheless "believe(s) that the better course would be to proceed to a full trial," presumably because in the circumstances of the case a fuller record might afford a more substantial basis for a decision. (Footnotes omitted). When a court denies summary judgment on that ground, it is well to inform the parties of its reasons and explain in what respects the record should be augmented.

Among the cases cited by these authors, is *Anderson v. Hodel*, 899 F.2d 766, 770-771 (9th Cir. 1990), where the court vacated a lower court's grant of summary judgment because of an inadequate record and a difficult question of interpretation of a complex statute. The court did this despite the three previously discussed 1986 Supreme Court decisions.[68]

The Commission and its judges have declined to issue summary judgments or vacate early rulings because of inadequate records.[69] The Complaint cannot be dismissed unless it appears beyond a doubt Odyssea is unable to prove any set of facts that will entitle it to relief.

PRPA's Motion for Summary Judgment goes through the counts of Odyssea's Complaint and PRPA argues how the evidence does not support the issues in the Complaint. What PRPA ignores are the basis principles of administrative pleadings. Discrimination cases are highly fact bound and in most administrative cases the ultimate facts may not only prove the violation alleged but may also prove another violation.

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[67] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

[68] *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp., et al*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317(1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

[69] See, *International Freight Forwarders & Custom Brokers Association of New Orleans v. LASSA*, Motions for Dismissal or for Summary Judgment Denied Without Prejudice, 27 S.R.R. 392 (ALJ 1995). A complainant had not yet had an opportunity to obtain evidence through discovery in *Agreement No. T-2880, as Amended (Pouch Terminal)*, 14 S.R.R. 1567 (FMC 1975) (ALJ's ruling finding jurisdiction vacated as premature); *NPR Inc., v. Board of Commissioners of the Port of New Orleans*, cited above, 28 S.R.R. 1011 (ALJ 1999) (summary judgment for respondent was denied without prejudice; complaint not dismissible on its face; the complainant allowed to use discovery to obtain evidence); *McKenna Trucking Co., Inc. v. A.P. Moller-Maersk,* cited above, 27 S.R.R. 1045 (ruling on summary judgment motion deferred pending completion of discovery).

The analysis, as stated in *Marine Surveyor's Guild v. Cooper T. Smith Corp.*, FMC Docket No. 87-21 (Nov. 1987), is what do the facts "prove," not what is alleged in an initial pleading.[70] The decision in *Marine Surveyor's Guild* is consistent with the decisions of the courts on review of agency decisions.

It is the duty of an agency to look to the substance of the complaint rather than its form and it is not limited in its actions by the strict rules of pleading and practice that govern courts of law.[71] Agencies are permitted to pierce pleadings and get to the facts.[72] PRPA's contention that the specific statutory citations in the Complaint are not supported by the evidence fails to recognize the basic rules of administrative pleadings.

The Complaint can only be dismissed for failure to state a claim if, assuming all facts alleged by Odyssea to be true, there is no legal ground upon which relief may be granted. Reasonable doubts are to be resolved in favor of Odyssea.[73] Odyssea has submitted evidence supporting its claim that is more than merely "conclusory allegations," or "unsubstantiated assertions," or only a "scintilla" of evidence.[74]

A Complaint should not be dismissed unless it appears beyond doubt that the complainant could prove no set of facts consistent with the allegations that would entitle the complainant to

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[70] *Maritime Surveyor's Guild v. Cooper T. Smith Corp.*, FMC Docket No. 87-21 at page 3 (Nov. 1987), quoting *Pacific Coast European Conf. – Limitation on Membership*, 5 F.M.B. 39, 42 no. 83 (1956). ("The most important characteristic of pleadings in the administrative process is their unimportance.").

[71] *Chesapeake & O. Ry. v. United States*, 11 F. Supp. 588, 592 (D. WV, 1935).

[72] See *Pittsburgh & Lake Erie Railroad Co. v. I.C.C.*, 796 F.2d 1534, 1539 (D.C. Cir. 1986), wherein the court affirmed an agency decision which involved the agency treatment of a "practices" claim as a request for a "rate prescription."

[73] See *Western Overseas Trade and Development Corp. v. Asia North America Eastbound Rate Agreement,* No. 92-06, 26 S.R.R. 1066, 1075 (ALJ), Aug. 16, 1993; see also *Crowley Liner Services Inc. v. Puerto Rico Ports Authority,* No. 00-02, 29 S.R.R. 394, 405-406 (ALJ Sept. 20, 2001), and cases therein.

[74] *Little v. liquid Air Corporations,* 37 F.3d 1069, 1075-1076 (5th Cir. 1994) (en banc).

the relief requested under the law that is invoked. *Crowley Liner Services, Inc. v. Puerto Rico Authority*, 29 S.R.R. 394, 405 (2001).

In PRPA's motion for summary judgment and for dismissal, "reasonable doubts are to be construed in favor of the non-moving party," Odyssea. The Complaint alleges facts that establish violations of the Shipping Act. The pleadings and evidence support the allegations in the Complaint. PRPA has failed to cite any adequate basis for finding otherwise.

Odyssea has submitted sufficient information through depositions, exhibits, stipulation of facts and other uncontested evidence to support its claim. Odyssea has shown it has more than conclusory allegations or unsubstantiated evidence. Therefore, there are genuine issues of material fact that must be resolved at a hearing to determine whether PRPA has violated the Act.

I. Count 1 - Failure to Observe and Enforce Just and Reasonable Regulations and Practices in Negotiating and Entering into Terminal Leases and Agreements - including preferential use, berthing and warehousing agreements.

Odyssea has met its burden in showing that there are genuine issues of material fact regarding PRPA's alleged failure to observe, establish and enforce just and reasonable regulations and practices, in violation of the Act as follows:

A. Whether PRPA has established rules, regulations, standards, guidelines and criteria that govern the leasing of terminal facilities and the granting of preferential usage and berthing.

B. Whether PRPA has properly promulgated and published its rules, regulations, standards, guidelines and criteria in accordance with the requirements of the Puerto Rico Uniform Administrative Procedure Act[75]

[75]See Title 3, Chapter 75, L.P.R.A.

C. Whether PRPA's rules, regulations, standards, guidelines and criteria were published in accordance with the Puerto Rico Uniform Administrative Procedure Act are unduly vague and therefore an unreasonable practice.

D. Whether PRPA employs unpublished guidelines and criteria that are discriminatory in their application as between applicants for new leases and the automatic renewals afforded tenants with existing leases and preferential use and berthing contracts.

E. Whether PRPA verbally leased facilities to some tenants and denied the existence of those leases and preferential berthing arrangements to Odyssea.

II. Count 2 - Refusal to Deal with Odyssea with regard to Entering into Terminal Leases and Agreements - including preferential use, berthing and warehousing agreements.

Odyssea has met its burden in showing that there are genuine issues of material fact regarding PRPA's alleged refusal to deal in violation of the Act, as follows.

A. Whether PRPA refused to deal with Odyssea by declining to lease it requested facilities while routinely leasing other parties the same or similar facilities.

B. Whether PRPA refused to deal with Odyssea by offering it the Isla Grande garbage dump (in an "as is" condition) in response to Odyssea's request for leasing facilities in September 2002.

C. Whether PRPA refused to deal with Odyssea by imposing upon it terms and conditions that are not contained in section four of PRPA's tariff, M-I-5, and are inconsistent with the terms and conditions stated in the tariff.

D. Whether PRPA refused to deal with Odyssea by affirmatively excluding it from competition for the stevedoring, handling, and storage of newsprint and other perishable paper products - thereby affording Odyssea's competitor an effective monopoly on the handling of such products.

III. Count 3 - Discrimination.

Odyssea has met its burden in showing that there are genuine issues of material fact regarding PRPA's alleged discrimination in violation of the Act, as follows:

A. Whether PRPA discriminated against Odyssea by failing to provide it with terminal facilities that are comparable to the terminal facilities that PRPA has provided to competitors of Odyssea.

B. Whether PRPA has discriminated against Odyssea by providing it with terminal facilities that do not meet the minimum standards required of common carriage.

C. Whether PRPA has discriminated against Odyssea by imposing an embargo on the leasing of facilities at Isla Grande that only apply to Odyssea.

D. Whether PRPA has discriminated against Odyssea by imposing rental charges for facilities that do not reflect the facilities actually provided; and further imposing rental charges that are ten times greater than those imposed upon similar facilities leased to Odyssea's competitors.

E. Whether PRPA has discriminated against Odyssea by: knowingly providing Island Stevedoring, Inc. with more space than it is charged for, knowingly maintaining false documentation in order to conceal discrimination, and permitting sub-leasing of PRPA facilities in contravention of its stated policy against sub-leasing.

IV. Count 4 - Unreasonable Practice of Misrepresentation and Deceit.

Odyssea has met its burden in showing that there are genuine issues of material fact regarding PRPA's alleged misrepresentation and deceit regarding the availability of preferential berthing, warehousing and open spaces and terminal facilities agreements in violation of the Act, as follows.

A. Whether PRPA engaged in deceit when it announced that the facilities at the Old Navy Base would be repaired before the tenants of Puerto de Tierra and their operations were moved to the Old Navy Base.

B. Whether PRPA engaged in deceit when the Chief of PRPA's Maritime Bureau, Mr. Edwin Rodriguez, represented to Odyssea that it was the new "policy" of PRPA not to grant any preferential areas.

C. Whether PRPA engaged in deceit when it represented to Odyssea that PRPA could not grant Odyssea's request for exclusive space at Hangars A, B and C due to the lack of available space.

D. Whether PRPA engaged in deceit when it represented to Odyssea that PRPA could not grant Odyssea's request for preferential berthing at Pier 16 due to development at Pier 16.

E. Whether PRPA engaged in deceit by denying it had entered into an arrangement with HUAL AS for the exclusive use of the El Pedregal area.

F. Whether PRPA engaged in deceit by denying who owned and controlled the Sea-Land Truck Terminal and PRPA's approval of the sub-leasing of that terminal.

V. Count V - Cease and Desist

Odyssea has met its burden in showing there are genuine issues of material fact requiring the entry of a cease and desist order against PRPA's for its continued violation of the Act in that it has in force and effect discriminatory and preferential agreements for the facilities located at the Port:

A. Whether a cease and desist order should be imposed due to PRPA's continued failure to publish and adhere to reasonable rules and regulations regarding the leasing of facilities and granting preferential usage agreements.

B. Whether a cease and desist order should be imposed due to PRPA's continued refusal to deal with Odyssea in good faith regarding its request for equal treatment and equal access to the same terms and conditions that PRPA provided other tenants in the Port.

C. Whether a cease and desist order should be imposed due to PRPA's failure to establish a facilities rental charge that is reasonably related to the facilities actually provided.

VI. Damages.

Odyssea has shown there are genuine issues of material fact that it incurred damages for injuries caused by PRPA by its continual violations of the Act, as follows.

A. Whether damages should be paid to Odyssea that reflect its lost business and profit caused by PRPA's violations of the Act.

B. Whether damages should be paid to Odyssea for the amount it has paid PRPA pursuant to its tariff that are in excess of the amount Odyssea would have paid PRPA

pursuant to a preferential use and exclusive use agreement such as those between PRPA and HUAL AS, Island Stevedoring, Inc., and Puerto Rico Line.

C. Whether PRPA has overcharged Odyssea in regard to the Pier 15 office building warehouse space, and if so, by how much.

D. Whether PRPA has overcharged Odyssea in regard to the loading dock covered storage at the Pier 15 office building, and if so, by how much.

E. Whether PRPA has charged Odyssea reasonable charges for marine terminal facilities that have a utilization rate of thirty-three percent of the capacity of other warehouse facilities in the Port.

F. Whether Odyssea has been damaged by the refusal of PRPA to grant preferential berthing at Pier 15 and the necessity that Odyssea move cargoes from Pier 14 to the storage areas at Pier 15.

PRPA seeks summary judgment and dismissal of the Complaint because Odyssea has not shown damages. PRPA argues that "Complainant fails to provide competent evidence of damages incurred by the alleged wrongdoing of Respondent. Therefore, Complainant cannot prove any of its claims and summary judgment must be granted in favor of Respondent." [76] PRPA bases this argument on a total misrepresentation of Commission precedent, as follows:

> Judge Kline noted in *Exclusive Tug Franchises - MTO Servicing the Lower Mississippi River*, 29 S.R.R. 718, 719 (FMC 2001, ALJ) that a party alleging anti-competitive practices "first has to show some type of harm resulting from the restrictive practice which, if shown requires the respondent to justify the practice."[77]

First of all, the cited *Mississippi River* case was not a Complaint case but a Commission-instituted investigation under the Shipping Act. Secondly, the harm Judge Kline was referring to had nothing to do with money damages. In *International Freight Forwarders & Custom Brokers Association of New Orleans v. LASSA*, 27 S.S.R. at page 399 (FMC Docket No. 95-12), Judge Kline

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[76] See Respondent's Reply to Complainant's Opposition to Respondent's Motion for Summary Judgment, dated March 15, 2004, page 2.

[77] *Id.* at pages 4-5; and at page 1, Respondent argues that the Complainant's "Statement of Issues consists of 25 points which the Complainant contends are in dispute, but which fail to raise a genuine issue of fact."

stated that any person may file a complaint with the Commission whether or not the person seeks reparation for injury:

> . . . As long ago as 1931, in *Isthmian S.S. Co. v. U.S.* . . . 53 F.2d 251, the Court affirmed the Commission's decision in *Associated Jobbers and Manufacturers v. American-Hawaiian S.S. Co.* . . . 1 U.S.S.B. 161. . . .
>
> . . . Complainant association [in *Associated Jobbers*] did not seek reparations but rather an order adjusting certain rates or "such other relief as to the board may seem proper . . . ." (*Id.,* at 163). The Commission's predecessor found undue and unreasonable preference and prejudice in violation of section 16 of the 1916 Act. . . . The Commission ordered respondent carriers to make certain rate adjustments so as to eliminate the violations. . . .

The principle that any person may file a complaint whether or not seeking monetary damages for injury caused to the complainant has been followed and confirmed many times since the *Isthmian* decision.[78] The issue of whether Odyssea incurred damages for injuries caused by the actions of PRPA must be resolved at a hearing.

The Complaint clearly includes allegations of continuing offenses and seeks reparations in connection with those violations. The Complaint was initiated due to PRPA's alleged ongoing failure to operate in accordance with requirements of the Shipping Act and its liability arises from continued violations of obligations of the Act. Odyssea has provided evidence, through depositions, exhibits, stipulation of facts and other uncontested evidence, that show there are material facts in dispute. Therefore, PRPA's motion for summary judgment is denied.

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[78]See *Int'l Frt. Fwdrs. & Custom Bkrs. Ass'n of New Orleans v. LASSA*, 27 S.R.R., FMC Docket No. 95-12 (ALJ Nov. 30, 1995), Motion for Dismissal or for Summary Judgment Denied without prejudice.

PRPA's request for a stay of the proceedings pending an appeal of the issue of Sovereign Immunity is denied.

This matter should not be stayed pending PRPA's appeal of the Sovereign Immunity issue. PRPA has only offered hearsay, including double and triple hearsay, regarding this matter. In over two years of litigation, PRPA has offered absolutely no substantial evidence it acted as an "arm of the state" regarding any of the issues herein. Hearsay evidence is admissible at administrative hearings; what weight it receives depends on the rest of the evidence. PRPA has only offered unsubstantiated and unreliable assertions that it is entitled to Sovereign Immunity under the Eleventh Amendment of the U.S. Constitution.

The parties have filed twelve volumes of pleadings and correspondence with the Commission, as well as hundreds of pages of exhibits, numbered 1 through 136. The only written exhibit PRPA offered into evidence was a copy of an unauthenticated speech that former Governor Pedro Rosselló allegedly gave to the hospitality industry at the Caribe Hilton Hotel & Casino to promote tourism in Puerto Rico. The Governor's speech[79] stated, in part, that:

> According to the World Travel and Tourism Council, close to 30% of the gross domestic product of the Caribbean region is attributable to tourism-related activity. Yet when I took office, tourism accounted for only 6% of Puerto Rico's gross product. I believed we could double that figure within the next decade or so.
>
> So as soon as I took office, we set out to do it.
>
> And when I say "we," I don't just mean "me." No, indeed: this had to be a cooperative enterprise. The Government would have to be involved, but the most important contribution that the Government could make would be to eliminate barriers to private-sector initiative. The Government's principal mission, in other words, would be to empower the private sector. (*Id.* at 1-2.) (Emphasis in original.)

* * *

[79]See Keynote Address by the Honorable Pedro Rosselló, Governor of Puerto Rico, delivered at a Hilton Incentive and Meeting Management Summit, Caribe Hilton Hotel & Casino, San Juan, Puerto Rico, November 18, 1998.

> Similarly, extensive improvements have been made at our cruise-ship piers in Old San Juan, and we have commenced the process of completely separating the port facilities devoted to cruise ships from those that handle cargo.
>
> * * *
>
> Our Ports Authority – as I mentioned earlier – will be engaged in improving both the esthetics and the efficiency of our ship-handling activity by relocating cargo operations away from Old San Juan and Puerto de Tierra, so that none of our cruise-line passengers will find themselves boarding or disembarking amid piers that are utilized by freighters and tankers. (*Id.* at 5.)

In an eleven-page speech, the separation of the cruise ship facilities from the cargo ship facilities was mentioned twice. The Governor never mentioned anything about ordering PRPA to do anything. PRPA's argument that a copy of the Governor's speech is evidence the Governor ordered PRPA to destroy Piers 8 and 14 at Puerto de Tierra and relocate the tenants to the Old Navy Base is not substantial evidence. This material lacks a basis in evidence having rational probative force.

The only other exhibits PRPA offered into evidence to support its theory PRPA acted as an "arm of the state" are comprised of more hearsay evidence given by interested parties at their depositions. These individuals heard the Governor and/or his aides "say" the Governor wanted Piers 1 to 14 destroyed to clear the area for cruise ships and parking for the Golden Triangle Project and Regatta 2000. This hearsay evidence hardly warrants a finding that PRPA acted as an arm of the State in destroying its facilities and in the alleged unlawful actions in the Complaint.

PRPA only offers more uncorroborated hearsay. Mr. Chief Justice Hughes' ruled in *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 230 (1938), that:

> . . . this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence.

PRPA's hearsay evidence is admissible at an administrative hearing, but it is "without a basis in evidence having rational probative force" to prove PRPA was acting as an arm of the State. PRPA's hearsay evidence is neither reliable nor meets the standard of "substantial evidence."

In *Richardson v. Perales,* 402 U.S. 389 at 401 (1970), the Supreme Court held that the NLRB's findings of fact shall be conclusive if supported by substantial evidence that was:

> . . . more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

At prehearing conferences on September 15 and 16, 2004, PRPA did not offer any new evidence to support its defense that it acted as an arm of the state and is entitled to Sovereign Immunity. All PRPA has done is argue the issue of sovereign immunity in its motions, replies, and other pleadings, as well as in its oral argument on summary judgment. PRPA has not provided any "substantial evidence" in its unsubstantiated assertions that it acted as an arm of the state in the matters alleged in the Complaint.

Furthermore, the issue of whether PRPA has sovereign immunity barring the Complaint under the Eleventh Amendment of the U.S. Constitution regarding the issues in this case, has been squarely rejected by the U.S. Court of Appeals for the First Circuit, the Court of Appeals in Puerto Rico and the Commission. Further argument as to the voluminous matters raised by PRPA would be unduly burdensome, costly and cause further unnecessary delay in this proceeding. As a result, PRPA's motion to stay proceedings pending appeal is denied because the issues before the Administrative Law Judge have been fully briefed.

Motion for Leave to Appeal, or in the Alternative, Motion for Reconsideration.

On August 20, 2004, PRPA filed a motion for leave to appeal, or in the alternative, motion for reconsideration of presiding officer's August 12, 2004 order rejecting and returning certain filings in violation of order barring further correspondence at the summary judgment stage of the proceeding, or in the alternative, to reconsider the order pursuant to FMC Rule 73 and Federal Rules of Civil Procedure Rule 60(b) for the reasons set forth therein.

The order of rejecting PRPA's unauthorized filings was based on an order entered by the Administrative Law Judge on April 30, 2004, barring any further written correspondence or communications from either party until the issue of summary judgment was decided. The reason for this order was that the file in this proceeding consisted of a constant exchange of letters, motions and objections between counsel for almost two years.[80] In addition, this evidence was becoming cumulative and producing undue delay in the conduct of the hearing.

The Administrative Law Judge has the right and duty to limit the introduction of evidence when, in her judgment, such evidence is cumulative or is productive of undue delay in the conduct of the hearing.[81]

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[80]See Order Rejecting and Returning Certain Filings in Violation of Order Barring Further Correspondence at the Summary Judgment Stage of the Proceeding, August 12, 2004.

[81]46 C.F.R. 502.154 provides:

> **§ 502.154 Rights of parties as to presentation of evidence.**
>
> Every party shall have the right to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. The presiding officer shall, however, have the right and duty to limit the introduction of evidence and the examination and cross-examination of witnesses when in his or her judgment, such evidence or examination is cumulative or is productive of undue delay in the conduct of the hearing. [Rule 154.]

The Complaint was filed in May 2002 and there were nine volumes of pleadings and correspondence, as well as hundreds of exhibits filed with the Commission. Many of the pleadings, documents, and exhibits were repetitious. On November 2, 2002, the previous Administrative Law Judge, Michael A. Rosas, admonished the parties not to provide him with any more unauthorized correspondence or communications.

Nevertheless, the parties continued to file a constant exchange of correspondence. Both parties were cautioned that further written correspondence would be barred at this stage of the proceeding. The notice of hearing stated that both parties would have the opportunity to argue their positions during the "Oral Argument on Summary Judgment," scheduled for May 21, 2004.[82] The parties were given their right to present their case or defense.

Notwithstanding the April 30, 2004 order, Counsel for PRPA continued to submit unauthorized documentation to the Administrative Law Judge, including a binder of exhibits that were left in the hearing room after the Oral Argument on Summary Judgment on May 21, 2004. Some of the documents consisted of new evidence that basically replied to Odyssea's Sur-Reply which violated Commission Rules of Procedure on prohibition of reply to a reply. Contrary to PRPA's allegation, these documents did not support its Sovereign Immunity defense.

In addition, Counsel for PRPA faxed the Administrative Law Judge a letter with a copy of a four-page Supplemental Public Invitation for Comments & Notice of Public Meeting ("Supplemental Invitation & Notice"), on June 10, 2004. The document was purportedly signed by the executive director for PRPA on June 4, 2004, and published in San Juan, Puerto Rico newspapers on that date.

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[82]See Notice of Oral Argument on Motion for Summary Judgment and ORDER, dated April 30, 2004.

The Supplemental Invitation and Notice only argued PRPA's defense against Odyssea's claims that: "PRPA has not published the standards, rules, regulations and criteria that may be employed by PRPA in processing, evaluation and decision making regarding the leasing of Respondent's facilities and the granting of contracts for preferential berthing."[83] The Supplemental Invitation & Notice did not support PRPA's Sovereign Immunity Defense.[84]

PRPA engaged in *ex parte* communications by arguing the issues in the *Odyssea* case in its responses to complaints against it in *International Shipping Agency, Inc. v. Puerto Rico Ports Authority*, FMC Docket No. 04-01 (*"Intership v. PRPA"*), and *San Antonio Maritime Corp. and Antilles Cement Corp. v. Puerto Rico Ports Authority*, FMC Docket No. 04-06 (*"SAM v. PRPA"*). Although PRPA counsel, Lawrence I. Kiern, was aware that the Administrative Law Judge presided over all three cases, Mr. Kiern never gave copies of the pleadings or attached exhibits in the *Intership v. PRPA* and *SAM v. PRPA* cases to counsel for Odyssea.

PRPA argues that it did not engage in *ex parte* communication with the Administrative Law Judge because the pleadings in the *Intership v. PRPA* and *SAM v. PRPA* cases are public records located in the FMC docket room and counsel for Odyssea has access to these public records. Needless to say, PRPA's rationale is without merit. The *ex parte* communication is PRPA's failure to notify opposing counsel of PRPA's argument against Odyssea's complaint in other cases before the Administrative Law Judge.

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[83]See Complainant's Sur-Reply to Respondent's Motion for Summary Judgment, dated April 15, 2004.

[84]Complainant's Opposition to Respondent's Motion for Leave to Appeal, or in the Alternative, for Reconsideration of August 12, 2004 Procedural Order, dated September 7, 2004. Odyssea submits that Mr. Bryant E. Gardner, counsel for PRPA, was the author of the Supplemental Invitation and Notice. Odyssea maintains that this exhibit was created by counsel for PRPA to be used as a vehicle for PRPA to file a frivolous appeal. "PRPA's tactic is nothing short than the creation/fabrication of evidence which may be used to 'defend' Odyssea's claims in this case."

Motion for Leave to Appeal Denied.

PRPA's request for leave to appeal the Administrative Law Judge's Decision is denied. PRPA's petition is not supported by the facts, existing law or the Rules of the Commission. Rule 502.153 governs motions for leave to appeal interlocutory decisions of Administrative Law Judges. Such appeals are specifically precluded unless approved and certified by the Administrative Law Judge.

The Administrative Law Judge must find that it is necessary to allow the appeal to prevent (1) substantial delay, (2) expense or detriment to the public interest, or (3) undue prejudice to a party. The movant must establish each of the listed elements and must tie such elements to discrete factual/legal issues. *Cf. Independent Pier Co. v. Philadelphia Port Corp. et. al.*, 25 S.R.R. 1381, 1382 (ALJ, February 20, 1991) (Procedural Order Denial of Leave to Appeal under Rule 502.153).

PRPA has not established its appeal is necessary to prevent substantial delay, expense, detriment to the public interest, or undue prejudice to a party. On the contrary, PRPA has caused substantial delay and expense for the other party who had to respond to issues concerning PRPA's *ex parte* communications and excessive motions.

PRPA's actions have been detrimental to the public interest. PRPA's arguments misstate the law, mischaracterize the Complaint, and take positions that are inconsistent with positions it followed in prior litigation. Unfortunately, it has taken more time than should be necessary to write a Summary Judgment ruling because the facts and law proposed by PRPA must be extensively researched due its misrepresentations. PRPA's lack of compliance with the letter and spirit of the Commission's Rules undermines Commission policy to "secure a just, speedy and inexpensive determination of every proceeding" for all parties.

Adherence to agency procedure is necessary to maintain the agency's integrity and to ensure that orderly conduct of agency business is conducted in a manner protective of the rights of all parties. PRPA's filings violate the basic underlying policies of the Commission's Rules of Procedure. If PRPA was granted its petition to appeal the Administrative Law Judge's interlocutory order, it would not secure a just, speedy and inexpensive determination of this proceeding. Therefore, PRPA's petition is denied because it has not established its appeal is necessary.

Petition for Reconsideration Denied.

In PRPA's argument for reconsideration, it submits that the Administrative Law Judge erred in her decision to bar further pleadings and correspondence in this proceeding until the issue of summary judgment was decided. Rule 502.61 governs petitions for reconsideration and has been strictly interpreted that the burden is upon the movant to specifically meet the requirements of that rule.

PRPA filed a lengthy, 71-page, motion for summary judgment in December 2003. Odyssea then filed an Opposition in February 2004. The Administrative Law Judge permitted a Reply and Sur-Reply. On April 22, 2004, PRPA sought leave to file further pleadings and for oral argument pursuant to Rule 502.74(d). On April 30, 2004, the Administrative Law Judge denied PRPA's request for further pleadings but permitted oral argument.

The Administrative Law Judge specifically barred the submission of any further pleadings pending disposition of the involved motion for summary judgment because of the barrage of repetitious filings. Nine volumes and hundreds of pages of exhibits were filed at the time the order was issued. Odyssea complied with the order; however, PRPA persisted to attempt to subvert the

Administrative Law Judge's Order. PRPA's actions violated many of the Commission's rules, in particular the Administrative Law Judge's authority to regulate the course of the proceeding.[85]

PRPA continued to delay this proceeding, as well as other proceedings before the Administrative Law Judge, by its voluminous multi-case filings and cross referencing where PRPA is a respondent. At the present time, this case alone contains twelve volumes and hundreds of pages of exhibits.

PRPA intentionally violated the order barring further correspondence at the summary judgment stage of the proceeding and its unauthorized correspondence was properly returned. PRPA has not shown that there has been a change in material fact or applicable law since the rejection of its documents. PRPA has not shown the Administrative Law Judge made a substantive error in material fact in her decision to bar further correspondence until a decision was made on the issue of summary judgment.

PRPA's petition for reconsideration and stay of proceeding only reargues a motion and alleges an error of law that are not substantiated by the facts or the law. PRPA had the opportunity to argue the issues in the proceeding and file exhibits into evidence for almost two years prior to the Administrative Law Judge's order barring further correspondence at the summary judgment stage of the proceeding. In addition, PRPA also had the opportunity for oral argument on its motion for summary judgment.

PRPA's petition for reconsideration does not address a finding, conclusion or other matter upon which it has not previously had the opportunity to address in its briefs or is included in Odyssea's arguments. Furthermore, PRPA had the opportunity to offer into evidence any new exhibits at the prehearing conferences on September 15 and 16, 2004.

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[85]See 46 C.F.R. 502.147.

PRPA's petition for reconsideration satisfies none of the requirements in Rule 502.261. The Commission addresses the issues of "Reconsideration" and Rule 502.261 in *West Gulf Maritime Association v. Port of Houston Authority*, FMC No. 74-15, 19 S.R.R.1501 (March 12, 1980), as follows:

> A petition for reconsideration which merely alleges the Commission erred in reaching its conclusions is summarily rejected. The Commission's Rules of Practice state that a petition for reconsideration will be subject to summary rejection unless it (1) specifies that there has been a change in material fact or applicable law, which has occurred after issuance of the decision or order; (2) identifies a substantive error in material fact contained in the decision or order, or (3) addresses a finding, conclusion or other matter upon which the party has not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party.

PRPA's petition for reconsideration does not meet the requirements of Rule 502.261, since it merely "alleged" the Administrative Law Judge erred in reaching her conclusions.[86] Therefore, PRPA's petition for reconsideration and stay of proceeding is denied.

PROCEDURAL ORDERS

Pursuant to the discussion above, PRPA's motion for leave to appeal, or in the alternative, motion for reconsideration of presiding officer's August 12, 2004 order rejecting and returning certain filings in violation of order barring further correspondence at the summary judgment stage of the proceeding, or in the alternative, to reconsider the order pursuant to FMC Rule 73 and Federal Rules of Civil procedure Rule 60(b) is denied.

PRPA's motion for summary judgment on all allegations of violation of section 10(d)(2) is not warranted under existing law and is denied.

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[86] *West Gulf Maritime Association v. Port of Houston Authority*, FMC No. 74-15, 19 S.R.R.1501-1502 (March 12, 1980).

PRPA's motion for summary judgment on Count 1's allegations of failure to establish, observe, and enforce reasonable regulations and practices in violation of section 10(d)(1) is not warranted under existing law and is denied.

PRPA's motion for summary judgment on Count 2's allegations of unreasonable refusal to deal or negotiate in violation of section 10(d)(3) is not warranted by existing law and is denied.

PRPA's motion for summary judgment on Count 3's allegations of undue or unreasonable preference or prejudice in violation of section 10(d)(4) is not warranted by existing law and is denied.

PRPA's motion for summary judgment on Count 4's allegation of misrepresentation is not warranted by existing law and is denied.

PRPA's motion for summary judgment of Odyssea's request for a cease and desist order is not warranted by existing law and is denied.

PRPA's motion for summary judgment based on sovereign immunity is not warranted by existing law and is denied.

Miriam A. Trudelle
Administrative Law Judge